Horizon Health Care Corp. d/b/a Greenery Extended Care Center in Cheshire *and* Maribeth Brown. Case 34–CA–6981

January 27, 1997

DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS BROWNING AND FOX

On June 26, 1996, Administrative Law Judge Steven Davis issued the attached decision. Thereafter, the General Counsel filed exceptions and a supporting brief, and the Respondent filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions and to adopt the recommended Order as modified and set forth in full below.[2]

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified and set forth in full below and orders that the Respondent, Horizon Health Care Corp. d/b/a Greenery Extended Care Center in Cheshire, Cheshire, Connecticut, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Bypassing New England Health Care Employees Union, District 1199, AFL–CIO (the Union), and dealing directly with its employees concerning the job duties and classification of cooks, and thereby failing and refusing to bargain in good faith with the Union as the exclusive collective-bargaining agent of its employees in the following appropriate unit:

> All full-time and regular part-time certified nursing assistants, cooks, dietary employees, maintenance employees, bed makers, unit clerks, receptionists, medical records employees, recreational directors and aides, social service employee, and nursing secretaries; but excluding all technical employees, all business office clerical employees, and all guards, professional employees and supervisors as defined in the Act.

(b) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days after service by the Region, post at its Cheshire, Connecticut facility copies of the attached notice marked "Appendix."[3] Copies of the notice, on forms provided by the Regional Director for Region 34, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current and former employees employed by the Respondent at any time since March 20, 1995.

(b) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

> To organize
>
> To form, join, or assist any union
>
> To bargain collectively through representatives of their own choice
>
> To act together for other mutual aid or protection
>
> To choose not to engage in any of these protected concerted activities.

WE WILL NOT bypass New England Health Care Employees Union, District 1199, AFL–CIO, and deal directly with our employees concerning the job duties and classification of cooks, and thereby fail and refuse

[1] The General Counsel has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[2] We shall modify the judge's recommended Order in accordance with our decision in *Indian Hills Care Center*, 321 NLRB 144 (1996).

[3] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

to bargain in good faith with the Union as the exclusive collective-bargaining representative of our employees in the following appropriate unit:

> All full-time and regular part-time certified nursing assistants, cooks, dietary employees, maintenance employees, bed makers, unit clerks, receptionists, medical records employees, recreational directors and aides, social service employee, and nursing secretaries; but excluding all technical employees, all business office clerical employees, and all guards, professional employees and supervisors as defined in the Act.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

HORIZON HEALTH CARE CORP. D/B/A GREENERY EXTENDED CARE CENTER IN CHESHIRE

Charles H. Pernal Jr. and *Margaret A. Lareau, Esqs.*, for the General Counsel.
William R. Neale, Esq., of Westerville, Ohio, for the Respondent.

DECISION

STATEMENT OF THE CASE

STEVEN DAVIS, Administrative Law Judge. Based upon a charge and an amended charge filed on March 20 and May 5, 1995, respectively, by Maribeth Brown, an individual, a complaint was issued against Horizon Health Care Corp. d/b/a Greenery Extended Care Center in Cheshire (Respondent).

The complaint alleges that Respondent unlawfully discharged Brown, and bypassed New England Health Care Employees Union, District 1199, AFL–CIO (the Union), and dealt directly with its unit employees concerning the job duties and classifications of cooks.

Respondent's answer denied the material allegations of the complaint, and a hearing was held before me in Hartford, Connecticut, on February 26 and 27, 1996.

On the evidence presented in this proceeding, and my observation of the demeanor of the witnesses, and after consideration of the briefs filed by the General Counsel and the Respondent, I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent, a corporation, having its office and place of business in Cheshire, Connecticut, has been engaged in the management of a nursing home located in Cheshire, which provides inpatient medical and professional care services for the elderly and infirm.

During the past year, Respondent, in conducting its business operations, derived gross revenues therefrom in excess of $100,000, and purchased and received at its Connecticut facility, goods valued in excess of $50,000 directly from points located outside Connecticut.

Respondent admits, and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act, and a health care institution within the meaning of Section 2(14) of the Act. Respondent also admits, and I find, that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. THE ALLEGED UNFAIR LABOR PRACTICES

A. *The Union Organizing Campaign*

Brown was employed by Respondent as a relief cook from September 1986 until her discharge in December 1994.

In February 1994, Respondent took over the operation of the Cheshire facility from a prior employer.

In late August 1994, Brown was asked by a fellow employee if she wanted to help in the Union's organizational campaign. Brown agreed, and solicited kitchen employees to sign cards for the Union. She also wore a union pinback button beginning in early September.

On August 30, the Union filed a petition for representation. Brown was outspoken thereafter. For example, shortly after the petition was filed she was told by Supervisor Roland Simmons that she did not have to "worry" about voting since she was a supervisor. She asked for an explanation, but none was given.

Thereafter, at a meeting of kitchen workers addressed by Respondent's attorney, Brown asked why she was considered a supervisor. The attorney asked if she gave orders to her coworkers, and Brown denied doing so.

Brown testified that at the representation hearing on the petition, she sat in the back of the hearing room, and was observed by Simmons and Walter Ohanion, Respondent's district manager, who continuously turned and looked at her and another employee.

Dennis Twigg replaced Simmons as Respondent's administrator on October 18. His responsibilities included participating in the employer's campaign against the Union. Toward that end, he asked the workers to give him 6 months in order to show them what he "could do" for them, and if they were not satisfied with his actions, they could contact the Union.

The General Counsel argues that certain election propaganda distributed by Respondent to its employees establishes its union animus. Respondent asserts that such documents were properly disseminated to its workers pursuant to its right under Section 8(c) of the Act to engage in free speech. Indeed, none of the documents has been alleged to violate the Act.

The communications, which consisted of newspaper articles concerning the effects of unionization at other facilities, generally urged employees to vote against representation, and asked that Respondent be given more time to earn their trust.

In mid-September, Susan Behrmann returned from another of Respondent's facilities to work at Cheshire as its food service manager. Brown had worked with Behrmann at Cheshire for several years prior to Behrmann's 1-year departure to work at another nursing home.

Brown testified that she called Behrmann shortly before her return to work, and informed Behrmann that a union was organizing the employees. Behrmann asked Brown whether she was involved, and Brown admitted that she was. Behrmann testified that during this call, Brown told her that a union was being organized, and further testified that from the information Brown told her, she knew that Brown was

involved with organizing for the Union. She also saw Brown and many other employees wearing union buttons.

Susan McGill, Respondent's night supervisor, also kept in touch with Behrmann. McGill testified that in about August or September, she kept Behrmann advised as to the course of the union campaign, including reporting Simmons' statement to her that Brown was the union organizer in the kitchen. McGill also identified other employees, in departments other than the kitchen, who were involved in organizing for the Union.

McGill testified that on September 9, she and cook George Barauskas were called to a meeting with Simmons. Simmons told them Respondent had a campaign "to keep the union out," and that there was no place in "health care" for a union. Simmons later told her privately that she was a supervisor, was considered a part of management, and that according to law, she was required to work with management to "discourage" employees from the union, and if she did not she could look for another job. He also told her that he was "in the hole $50,000 per month" because of Respondent's campaign against the Union, and that the facility would close if the Union won the election. He added that in the event of a strike it would hire replacement employees who were readily available.

That evening, McGill phoned Behrmann and told her what Simmons had said. Two days later, Behrmann visited her at home and told her that she should not get involved with the Union, and repeated Simmons' statement that there was no place in health care for a union. McGill asked whether she would be discharged if she got "involved," and Behrmann said that she could not answer that question.

Behrmann testified that during that meeting, she told McGill that as a supervisor, she should "stay clear of union activity."

McGill testified that on September 15, Simmons told her that Behrmann was returning to work at Cheshire in order to "keep the union out," adding that because of her past work at Cheshire, she had influence over the employees and could "change peoples' minds." McGill further stated, however, that Behrmann said that Simmons told her to return with "an open mind," and that Brown was the organizer in the kitchen. Behrmann testified that she was expected to participate in the campaign on behalf of management.

Brown testified that in October, Walter Ohanian, Respondent's regional vice president of its northeast division, entered the kitchen and asked if he could do anything for the workers. Brown replied that there were many flies in the kitchen. Later, Simmons angrily called Brown "stupid," and said that the doors should not be kept open. Brown told Ohanian about that incident, and he said that he did not think it was "fair" for Simmons to call the employees stupid. He said he would take care of the matter.

Thereafter, Simmons yelled at Brown for telling Ohanian what he had told her, and apologized for his comments, but added that Brown should have come to him.

At about that time, Behrmann asked Brown if she read the Union's handbook. Brown denied doing so, whereupon Behrmann suggested that she read it in order to learn about her dues and obligations. Also at around the same time, Simmons asked Brown what the "going rate" was for union employees. Brown replied that she did not know, and would have to speak to someone about it.

Twigg, Respondent's new administrator, began work at the facility on October 18. While walking through the kitchen shortly after his arrival, accompanied by Behrmann and Simmons, Behrmann told him that the facility had received a high score from a health care agency which evaluates nursing homes. Twigg asked whether during the inspection, Behrmann put Brown in a closet. Although Brown laughed at the time of the remark, she complained to other employees about his comment.

B. *The Alleged Direct Dealing with Employees*

On October 25, an election was held at which the Union was selected, and on November 2 it was certified as the representative of the approximately 130 employees in the following appropriate collective-bargaining unit:

> All full-time and regular part-time certified nursing assistants, cooks, dietary employees, maintenance employees, bed makers, unit clerks, receptionists, medical records employees, recreational directors and aides, social service employee, and nursing secretaries; but excluding all technical employees, all business office clerical employees, and all guards, professional employees and supervisors as defined in the Act.

On November 8, Twigg opened a meeting of kitchen employees by saying that he heard that Brown had a "beef" with him. Brown responded that she did not believe that it was "fair" for him to have spoken to her in the manner in which he did on October 18. Twigg said that his remark was only meant as a joke. Brown replied that she did not take it as a joke.

Twigg testified that he heard from Behrmann that Brown was complaining to other kitchen employees that Twigg had insulted her. Twigg apologized to Brown for his remark about her, and also told her that if she was offended or had a problem with what he said, she should have come to him with her complaint rather than talking to the other employees about it.

Twigg testified that he did not believe that Brown accepted his apology, and at that point, he came to believe that she was sympathetic to the Union because unions usually "strive to make management appear insensitive and unresponsive." Twigg further stated that he believed that he was "victimized and misrepresented," and that Brown had intentionally misrepresented to her coworkers what had happened. Twigg further believed that this was part of a "union ploy or tactic," and he began to suspect that perhaps she told her coworkers that he had insulted her in order to portray him in a bad light.

Respondent included the cooks on the election eligibility list, and they voted in the October 25 election. At the November 8 meeting, Twigg distributed to, and asked the cooks to sign a document entitled "acknowledgment of supervisory duties and responsibilities for cooks." The document stated essentially that the employee confirms that she is a first-line supervisor, a member of the management team, and that she has the authority to assign work and independently counsel employees, discipline employees, evaluate new and incumbent employees, and resolve grievances.

At the meeting, Brown asked if the cooks would receive more money since they would be "in charge." Twigg's reply was a question whether money was all she cared about.

Brown responded that she would speak to the Union about this matter, and she refused to sign the acknowledgment. Only one of the four or five employees present signed the document. Cassidy testified that she also refused to sign, saying that she never had the responsibilities set forth in the acknowledgment.

Twigg testified that the purpose of his asking the cooks to sign the document was to confirm that they would continue to perform those duties, which included supervisory responsibilities, which he claimed they had already been doing.

The job descriptions for cooks which were in effect from the time that Respondent began its operation of the facility through the end of 1994, provide generally that the cooks' main duties include the preparation, cooking, tasting and serving of resident meals, and cleaning the work area. Certain supervisory responsibilities for the cooks were also listed, as follows:

> Limited supervision of other employees when Food Service Supervisor is absent.[1]
>
> Assumes managerial duties in the absence of kitchen manager and on the weekend shift.

C. *The Discharge*

Brown testified that on December 9, she and her fellow workers, following their break, commented about a Christmas tree which was in the recreation room. Brown described the artificial tree as ugly, dilapidated, and "fallen down." Normally, the facility's Christmas trees were decorated and displayed by that time, but this one was not. Rather it was "thrown on the floor, all crumpled up, nasty looking, all crunched together, and the stand was broken, laying on the floor." In contrast, Behrmann testified that the tree was in "decent" shape, but was an older-style tree.

According to Brown, Diane Maccio, a recreation department employee, had given it to Emilio Santos, a maintenance worker. Brown advised Santos that the tree was usable if it was decorated, and she offered to take it if Santos did not want it. Santos asked Maccio, and she said that she had already given it to him, but if he did not want it, Brown could have it.

Brown agreed to take the tree, and Santos said he would leave open the door from the recreation room to the outside of the building. Later, Colin Kempi, another maintenance employee, told Brown that the outside door was open. Brown testified that she took the tree because "they" said they were not going to use it, but then conceded that no one told her that.

Brown finished work at about 5:15 p.m., and when her husband picked her up, they put the tree in the car and took it home. Later, Maccio called and said that the tree should be returned, that Respondent had called the police, and that Brown would be arrested and discharged.

The following morning, Brown returned the tree to the facility.

The next workday, December 12, Brown reported to Twigg's office where she was told that she was suspended pending further investigation for theft of Respondent's property. He asked if she had a supervisor's permission to take the tree. Brown said that she did not, adding that she did not steal the tree, but that it was given to her by Santos who was given it by Maccio. Twigg asked if they were supervisors, and Brown conceded that they were not. In a conversation later that day, Twigg asked if Brown had written authorization from a supervisor to take the tree, and Brown said that she did not.

Later that day, Twigg told Brown that she would be discharged, but could resign, in exchange for which she would receive 2 weeks' vacation. Brown chose discharge.

D. *Respondent's Reasons for the Discharge*

Behrmann testified that on December 9, a nurse's aide told her that he saw Brown "steal" the Christmas tree. Behrmann told the security guard of the theft, who reported it to the evening nurse supervisor. Behrmann determined that the tree was stolen from the recreation room, and she called the recreation director and asked if she or her staff had given permission to Brown to take the tree. Shortly thereafter, the director called Behrmann and said that no one had given permission. Behrmann was later told by Brown that Diane Maccio, the recreation department employee, had given her permission to take the tree. Behrmann then called the director of nurses who called the Cheshire police.

During the course of their investigation, the police suggested that rather than charge Brown with theft, Respondent should ask her to return the tree. As set forth above, Brown was called and returned the tree the next morning.

An internal investigation was conducted by Twigg, during which he and Behrmann interviewed witnesses to the alleged theft. Written statements were taken from several employees.

Behrmann testified about recreation department employee Diane Maccio's oral statement to her and Twigg. Maccio told them that Brown asked for the tree, and Maccio agreed, saying she would obtain a replacement from her son in law's store. Maccio also stated that her so-called gift was meant as a joke, and she did not believe that Brown took her seriously. Maccio's written statement, however, is to the effect that employee Emilio Santos asked for the tree, and she agreed to give it to him, but she added that she had no authority to give it away, and in any event she believed that Santos was joking about his interest in the tree, and she went along with the joke. Her written statement says that she did not speak to Brown during this episode. Maccio did not testify at the hearing.

Employee Emilio Santos gave contradictory statements. He first said that he gave permission to Brown to take the tree because it was broken and he was going to fix it. Behrmann checked with the recreation director and learned that the tree was not broken, and she intended to use it. Santos' second statement was that he did not give permission for Brown to take the tree, and admitted lying when he made the earlier statement. Santos' new version was that Brown announced in the recreation room that she would take the tree, and he would leave the door unlocked.

Employee Colin Kempi initially told Twigg that he knew nothing about the tree, and he denied leaving the door unlocked. Later, he admitted that Santos asked him to leave the door open for Brown, and he did so. Twigg told him that leaving the door unlocked created a "safety issue," and that he should have reported the request to a supervisor.

[1] The description for the breakfast and dinner cook states that the cook has such responsibilities when the food service supervisor is present. That is an obvious error.

McGill, Respondent's night supervisor, testified that she was present at the discussion regarding the tree, and heard Santos say that Maccio told him that he could have the tree, but that he did not want it. Brown then said that she would take the tree.

McGill's statement would have the effect of establishing that she, as Respondent's supervisor, was present when Brown announced that she was taking the tree. Although McGill did not expressly grant permission to Brown, the General Counsel argues that her presence at the scene establishes that Respondent impliedly approved Brown's removal of the tree.

Respondent argues that it did not give any credence to McGill's report, in effect stating that it did not believe her, because none of the other employees who gave statements concerning the incident mentioned that she was there. Brown testified that McGill was present during part of the incident.

The written statements of Maccio, Kathy Maheu, and Santos state that Maccio gave the tree to Santos with the statement that she would replace it with a tree from her son in law's secondhand store.

When Brown was called in following the interviews of the other employees, she was told that Respondent had concluded that she stole the tree. Brown denied that, and insisted that the tree was given to her. She was discharged. Her discharge notice stated that she was "terminated for misappropriation of facility property—took facility xmas tree without any authorization from a supervisor. Returned tree after contacted by police."

Following Brown's discharge, Twigg orally warned and disciplined Santos for lying to him about whether he gave Brown permission to take the tree. Twigg also chastised Kempi.

E. *Past Practice Concerning the Removal of Items from the Facility*

There was testimony concerning employees' removal of items from Respondent's premises. Brown testified that Maccio gave her poinsettia plants, a decorator fan and small candles. McGill testified that Respondent had no policy regarding employees taking things home, specifically there was no requirement for a supervisor's approval for such removal. She stated that in the past, the recreation department had extra poinsettia plants, and small candles which were not needed, and recreation department employees told other workers to take them home. Brown and Cassidy gave similar testimony. Cassidy and Behrmann testified that they had taken boxes and containers home.

Cassidy stated that about 3 weeks after Brown's discharge, Behrmann told her that "in the future" employees must obtain a note from their supervisor permitting the removal of items from the premises.

In contrast, Behrmann testified that Respondent had an unwritten policy concerning such matters, pursuant to which supervisors must give their written permission to employees in order for them to take such items. She also stated that a couple of years before the discharge, Brown told her that she would ask the maintenance supervisor if she could take a piece of linoleum left over from an installation of Respondent's basement floor.

Twigg testified that the poinsettias taken by employees were not company property. Rather, they were donated to the home's residents by a local florist. After all the plants were distributed to residents, the employees were given permission to take them.

F. *Respondent's Rules and Their Enforcement*

Respondent has written rules concerning its employees' conduct. As relevant here they are as follows:

> 1. Theft or attempted theft of property belonging to patients, visitors, employees, the facility or company.
> 2. Falsifying facility records.
> 3. Leaving the facility area without permission prior to completion of shift or tour[.]
> 4. Sleeping during work hours.
>
> For the first offense for the above, the action to be taken is suspension for investigation, and discharge.
>
> 5. Leaving work area without permission.
>
> For the first offense, a first written counseling; for the second offense, a second written counseling; and for the third offense, a third written counseling and discharge.

The General Counsel argues that, even assuming that Brown stole the tree, discharge for such conduct was not consistent with Respondent's treatment of other employees who violated its rules.

The General Counsel's disparate treatment theory is somewhat hampered by its failure to obtain any evidence that employees had been disciplined for theft of company property. Instead, the General Counsel relies upon other misconduct by employees and seeks to show that lesser discipline was imposed upon them than Respondent's rules called for.

In July 1994, Registered Nurse Paula Bushnell falsified her timecard to state that she worked 2 hours more than she actually worked, and was discharged, having admitted the offense.

In October 1994, nurse's aide Frank Johnson left the floor at 3 a.m. without telling anyone where he was going, and was found 1 hour later "apparently sleeping" outside the building. He was given a written counseling, requiring that he take breaks in the court yard only in the company of other aides. The counseling form stated that he had received a counseling within the past 12 months.

In December 1994, bedmaker Judith Hay left work nearly 1 hour early, without authorization or notification to anyone. The next day, she failed to appear for work and did not phone her supervisor. She received a written counseling, which informed her that three related or unrelated written counselings would result in immediate termination. She was counseled as to the procedure to follow when she was unable to come to work or had to leave early. Ten days later, Hay failed to report to work for 2 days without notification, and was discharged.

In May 1995, nurse's aide Rita Orciso received a written counseling for being observed sleeping at two different times on her shift. She was counseled concerning Respondent's policy concerning sleeping during work hours, and was warned that a repetition of the above would result in appropriate action pursuant to its policies.

Respondent's rules required that Johnson, Hay, and Orciso be discharged for these offenses, but they were not terminated. Rather, they were given lesser forms of discipline.

G. *Respondent's Defense*

Respondent denies that it discharged Brown in violation of the Act. It argues that it acted properly in terminating her for theft of company property. Respondent further denies that it had animus toward the Union. It contends that its statements to employees concerning unionization constitute matters of free speech, and notes that no violations of the Act have been alleged concerning its preelection campaign material.

In addition, Respondent states that it has "resolved" a collective-bargaining agreement with the Union. Although the agreement may not have been signed, Respondent believes that it is bound by such contract, and is operating as closely as possible to its terms.

III. ANALYSIS AND DISCUSSION

A. *The Alleged Direct Dealing with Employees*

The complaint alleges that on November 8, 1994, Respondent bypassed the Union and dealt directly with its unit employees concerning the job duties and classification of cooks.

Respondent alleges that the amended charge, filed on May 5, 1995, in support of that complaint allegation was not timely filed. I do not agree. The amended charge, which alleges the violation of direct dealing with employees, was timely filed inasmuch as the incident occurred on November 8, 1994, less than 6 months before the amended charge was filed.

The evidence establishes that on November 8, as set forth above, Twigg asked the cooks to sign an acknowledgment of their allegedly supervisory duties, containing a detailed description of supervisory responsibilities which the employee agrees that she possesses.

Upon the Union's certification on November 2 as the exclusive collective-bargaining representative of the employees, Respondent was required to bargain with it concerning terms and conditions of its employees' employment. It could not thereafter deal directly with its employees concerning their duties or classification, or change such terms or conditions without consulting the Union and giving it an opportunity to bargain about the changes. *Central Cartage, Inc.*, 236 NLRB 1232, 1258 (1978).

The acknowledgment which Respondent asked the employees to sign amounted to their recognition that they were statutory supervisors. However, that acknowledgment did not accurately describe the job of cook as it had previously existed. *Central Cartage*, supra. Thus, there was testimony, which I credit, that the cooks did not possess, and had not exercised the supervisory authority set forth in the acknowledgment. Although the current job descriptions set forth certain responsibilities which might be of a supervisory nature, the extent of the duties mentioned was extremely limited and restricted. Thus, a finding may not be made that the cook exercising those responsibilities was a supervisor, especially considering that there was no testimony that those responsibilities were ever exercised.

Thus, before attempting to change the duties and classification of bargaining unit employees, which would result in the employees' removal from the bargaining unit to supervisory positions, Respondent must bargain with the Union. *Luther Manor Nursing Home*, 270 NLRB 949, 960 (1984). In not doing so, and by dealing with the employees directly concerning their classifications and job duties, by requesting that they sign the acknowledgment, Respondent has unlawfully bypassed the Union and engaged in direct dealing with its employees in violation of Section 8(a)(5) and (1) of the Act.

B. *The Discharge*

1. The General Counsel's prima facie case

Brown was an advocate for the Union during its campaign to organize the kitchen employees of Respondent. Respondent's official Behrmann admitted knowing that Brown was involved with the Union's drive. Brown solicited membership in the Union and was present at the representation hearing. Respondent's opposition to the Union is clear.

The General Counsel's case involves more than Brown's activism in behalf of the Union. Her outspokenness made her a thorn in the side of management as is evident in Twigg's testimony that she manipulated the circumstances surrounding his remark to her so as to put him in a bad light. He construed her actions in "intentionally misrepresenting" what had occurred as a union ploy or tactic. *Merillat Industries*, 307 NLRB 1301, 1307 (1992).

Brown's discharge, coming only 1 month after the confrontation with Twigg, and after 8 years of acceptable work, warrants an inference that her union activity was at least part of the motivation therefor. *Wright Line*, 251 NLRB 1083 (1980).

Having found a prima facie case of unlawful motivation in the discharge of Brown, the burden shifts to Respondent to prove that it would have discharged her even in the absence of her union activities. *Wright Line*, supra.

2. Respondent's Defense

As set forth above, Brown removed a Christmas tree from the recreation room on December 9. Her defense and explanation was that she had been given the tree by Maccio.

Upon learning of the tree's removal, Respondent immediately undertook an investigation which was conducted scrupulously. *Salvation Army Residence*, 293 NLRB 944, 982 (1989). Pursuant to its rules, it suspended Brown pending an investigation. It obtained written statements and conducted interviews of those employees known to have been involved. It also obtained Brown's version of the facts.

As set forth above, Maccio's version of the events was contradictory and did not support Brown. Thus, she stated that she told Brown, as a joke, that she could take the tree, and her written statement denies that she spoke to Brown at all about the tree.

Thus, Respondent could reasonably conclude that Maccio did not give Brown the tree, and therefore that Brown stole it. I find that Respondent reasonably believed that Brown stole the tree. The circumstances surrounding this determination supported Respondent's belief. They include its conclusions that Maccio's versions were not consistent and she did not admit giving Brown the tree; Behrmann's learning that Brown threw the tree over a fence in the back of Respondent's property; Brown's car speeding away from the scene; and Brown's leaving her keys at the facility, all in an apparently hurried attempt to leave the grounds. Thus, Respondent's action against Brown was reasonable under the circumstances apparent to it at that time. *Phoenix Glove Co.*, 268 NLRB 680, 682 (1984).

Respondent argues that even if Maccio gave the tree to her, she had no authority to do so.[2] I reject the General Counsel's argument that Respondent's requirement that a supervisor authorize the removal of property was newly created in order to facilitate Brown's discharge. Respondent's rule is clear. It provides for discharge for theft of property belonging to the facility. Pursuant to that rule, it is manifest that only a Respondent's representative or supervisor may permit the removal of its property. The evidence does not support a finding, as urged by the General Counsel, that Respondent's property had been removed in the past, or could be removed simply if another employee authorized its taking. The tree was Respondent's property. Only its supervisor could permit its removal.

Moreover, even assuming that Maccio gave Brown the tree, there is no showing that Maccio possessed the authority to give away Respondent's property. In this respect, the fact that Maccio had given away other items in the past does not mean that she properly did so or that Respondent approved of her actions. There is also a difference in kind between perishable poinsettia plants, boxes, containers, and small candles or candle holders, and a Christmas tree belonging to the facility. The plants and the other items were donated by local merchants to the residents, with the excess being given to employees. The candles or candle holders were left over from a fair. The boxes and containers would have been discarded.

The Christmas tree was scheduled to be used at the facility, and in fact was used after its return. Although Brown characterized it as an old, useless tree, nevertheless she considered it suitable for her use, and it was used by the facility that year. The Board has found that employees were properly discharged for stealing items of little value. *Merillat*, 307 NLRB 1301, 1303 (1992), sandpaper valued at less than $2; and *Hampton Inn*, 309 NLRB 942, 946 (1992), $2.50; *Salvation Army Residence*, 293 NLRB 944, 981 (1989), worthless carpeting.

Further, I credit Respondent's witnesses that they did not believe that Supervisor McGill was present during the incident. Their conclusion was based upon the facts that no other employee who was interviewed stated that McGill was present, and McGill's statement was to the effect that she came upon the scene later. Moreover, even according to McGill's statement, she did not give Brown permission to take the tree. She was apparently only an observer to the incident as it occurred. In addition, Brown did not claim to have been given permission by McGill to take the tree.

There is no evidence that any other employee had stolen property from Respondent and had not been discharged. However, there is evidence that a nurse was discharged for theft of time, in that she falsified her timecard to state that she worked 2 hours more than she had in fact worked. *Animal Humane Society*, 287 NLRB 50, 51 (1987). That incident occurred 5 months before Brown was terminated. Respondent's action in that case was consistent with its actions taken toward Brown. I reject the General Counsel's argument that that incident was different because the nurse admitted her falsification of the timecard, and in contrast Brown denied stealing the tree. Whether the violation was admitted by the employee or found by the Respondent, the result was the same. The employee was removed from employment. *Merillat*, supra at 1302.

Although there was ill will between Twigg and Brown, no independent violations of Section 8(a)(1) have been alleged concerning his conduct toward her, and I cannot find that Respondent was determinate her for a contrived reason. I also note that Respondent took action against Santos and Kempi for their parts in the episode, thereby demonstrating that its discipline was limited to Brown.

Although there is some evidence that other rules which called for immediate discharge were violated, but the employees were not fired, those matters did not involve instances of theft of property and are not comparable to the instant situation.

I accordingly find and conclude that Respondent has met its burden of proving that it would have discharged Brown even in the absence of her union activities. *Wright Line*, supra.

CONCLUSIONS OF LAW

1. Respondent, Horizon Health Care Corporation d/b/a Greenery Extended Care Center in Cheshire, is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act, and a health care institution within the meaning of Section 2(14) of the Act.

2. New England Health Care Employees Union, District 1199, AFL–CIO is a labor organization within the meaning of Section 2(5) of the Act.

3. All full-time and regular part-time certified nursing assistants, cooks, dietary employees, maintenance employees, bed makers, unit clerks, receptionists, medical records employees, recreational directors and aides, social service employee, and nursing secretaries; but excluding all technical employees, all business office clerical employees, and all guards, professional employees and supervisors as defined in the Act constitute a unit appropriate for collective bargaining within the meaning of Section 9(b) of the Act.

4. At all times material, the Union has been and is the exclusive collective-bargaining representative of all employees in the unit set forth above within the meaning of Section 9(a) of the Act.

5. By, on about November 8, 1994, bypassing the Union and dealing directly with its employees in the unit concerning the job duties and classification of cooks, Respondent violated Section 8(a)(5) and (1) of the Act.

6. By discharging Maribeth Brown, an individual, on about December 9, 1994, Respondent has not violated the Act.

7. Respondent has not committed any violations of the Act not found herein.

THE REMEDY

Having found that Respondent has engaged in certain unfair labor practices, I shall recommend that it be ordered to cease and desist therefrom, and to take certain affirmative actions designed to effectuate the policies of the Act.

[Recommended Order omitted from publication.]

[2] Maccio said that she would obtain another tree for the facility if Brown took one. Thus, Maccio seemed to suggest that she knew that Brown's removal of the tree was improper.